

 **ORIGINAL**

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter Of)	
)	
Reallocation of the 216-220 MHz,)	WT Docket No. 02-08
1390-1395 MHz, 1427-1429 MHz,)	RM-9267
1429-1432 MHz, 1432-1435 MHz,)	RM-9692
1670-1675 MHz, and 2385-2390 MHz)	RM-9797
Government Transfer Bands)	RM-9854
)	RM-9882

**JOINT REPLY COMMENTS OF
 DATEX SPECTRUM, L.L.C. AND
U.S. TELEMETRY CORPORATION**

Datex Spectrum, L.L.C. ("Datex") and U.S. Telemetry Corporation ("UST") (together, "UST/Datex"), by counsel and pursuant to Section 1.415(c) of the Commission's Rules, hereby submit the following Joint Reply Comments in connection with the Notice of Proposed Rule Making released February 6, 2002 in the above-referenced proceeding (the "*NPRM*"). Among other things, the *NPRM* proposes new service rules for licensing the 27 MHz transferred from Government to non-Government use pursuant to the Omnibus Budget Reconciliation Act of 1993 and the Balanced Budget Act of 1997.¹

For the Secretary
 LISA B. COE

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¹ See Pub. L. 103-66, 107 Stat. 312 (1993) and Pub. L. 105-33, 111 Stat. 251 (1997). See *Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, Report and Order and Memorandum Opinion and Order*, ET Docket No. 00-221, FCC 01-382 (released January 2, 2002) (the "*Reallocation Report and Order*"). The *NPRM* is a companion proceeding to the proceeding that resulted in the *Reallocation Report and Order*.

Introduction

UST/Datex objects to the proposal of Data Flow Systems, Inc. (“Data Flow”) to license the 217-220 MHz band for the exclusive use of water utility telemetry services.² The FCC in the *Reallocation Report and Order* determined the allocation of services in the 216-220 MHz band. Data Flow’s belated attempts to reconfigure the band – and to eliminate all incumbent services in the 217-220 MHz band in favor of water utility telemetry services – must be rejected as directly at odds with the FCC’s determination. Similarly, Data Flow’s fallback proposal to elevate new telemetry services in the 217-220 MHz band to primary status must be rejected because the FCC in the *Reallocation Report and Order* considered and rejected nearly identical proposals, determining that secondary telemetry status is adequate to meet the needs of telemetry operators.

Discussion

The FCC, in the *Reallocation Report and Order*, retained primary status for the 218-219 MHz Service (among other primary incumbent uses) and a secondary allocation for telemetry services throughout the 216-220 MHz band. Now, Data Flow proposes that the 217-220 MHz band should be “dedicated” nationwide to “the *exclusive* use of a single category of users” -- water utility telemetry services.³ As an alternative to its exclusivity proposal, Data Flow asserts that incumbent Advanced Maritime Telecommunications Service (AMTS) users “may be tolerated on a co-primary basis” with telemetry services.⁴

² See Comments of Data Flow Systems, Inc. in WT Docket No. 02-08.

³ *Id.* at p. 4 (emphasis added).

⁴ *Id.* at pp. 4, 5. Data Flow does not make clear whether it proposes “tolerating” other incumbent uses, such as the 218-219 MHz Service.

As stated above, the relocation of existing services in the 217-220 MHz band to accommodate the “exclusive” use of water utility telemetry services is directly at odds with the conclusions reached in the *Reallocation Report and Order*, in which the FCC determined that AMTS and the 218-219 MHz Service, among others, should continue to be licensed at 217-220 MHz on a primary basis. Data Flow had ample opportunity to air its band usage proposal in the context of the Reallocation Proceeding, but did not do so. Data Flow’s attempt to raise these issues after the fact in the context of a related but different proceeding is procedurally infirm and an abuse of process, and must be summarily dismissed as such.

On its “merits,” Data Flow’s proposal fares no better. The FCC has previously determined in the *Reallocation Report and Order* that secondary status is adequate for telemetry operations in 217-220 MHz.⁵ Data Flow does not even attempt to demonstrate otherwise in its comments. Moreover, neither an exclusive allocation for water utility telemetry services, nor the elevation of telemetry services to primary status, is necessary for the provision of telemetry services at 217-220 MHz. Data Flow simply ignores the fact that operators may obtain AMTS or 218-219 MHz Service spectrum through other means to provide telemetry services on a primary basis.⁶ Furthermore, secondary telemetry operators are not prevented from negotiating with incumbents in the private market.

Elevating telemetry operations to exclusive or primary status also could undermine the significant investments made to date by incumbent users of the spectrum that have crafted

⁵ *Id.*

⁶ See *Reallocation Report and Order* at p. 15.

business plans based on having unencumbered spectrum.⁷ Again, Data Flow has offered absolutely no justification for disrupting the incumbent use of the 217-220 MHz band for multiple services.

Conclusion

Data Flow's proposal must be rejected because it exceeds the scope of the instant proceeding and fails to provide meaningful justification for restricting use of 217-220 MHz band to Data Flow's preferred services. Data Flow also ignores the heavy incumbent use of this band and fails to acknowledge that its proposed services can be provided through obtaining 218-219 MHz Service licenses at auction. Accordingly, UST/Datex respectfully submit that the FCC should not modify its rules to accommodate the Data Flow proposal.

Respectfully submitted,

**DATEX SPECTRUM, L.L.C. and
U.S. TELEMETRY CORPORATION**

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⁷ Accordingly, UST/Datex take issue with Paging Systems, Inc.'s assertion the 218-219 MHz band is "underutilized." See Comments of Paging Systems, Inc. in this proceeding at p. 5.

CERTIFICATE OF SERVICE

I, Kenn Wolin, Senior Legal Assistant, with Manatt, Phelps & Phillips, LLP, do hereby certify that I have caused a copy of the foregoing *Joint Reply Comments of Datex Spectrum, L.L.C. and U.S. Telemetry Corporation* to be hand-delivered to the following:

- 1) Dana Davis*
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